

HOUSE BILL NO. 72

INTRODUCED BY K. VAN DYK

BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE PROFESSIONAL EMPLOYER ORGANIZATION LAW; DESIGNATING ESTABLISHING REQUIREMENTS FOR THE DEPARTMENT OF LABOR AND INDUSTRY A CRIMINAL JUSTICE AGENCY FOR PERTAINING TO BACKGROUND CHECKS RELATED TO PROFESSIONAL EMPLOYER ORGANIZATION LICENSING; REQUIRING FINGERPRINTS AND BACKGROUND CHECKS FOR KEY PERSONS IN PROFESSIONAL EMPLOYER ORGANIZATIONS; ALLOWING WAIVERS OF CERTAIN PERIODIC REPORTING REQUIREMENTS; REQUIRING PROOF OF MONTANA WORKERS' COMPENSATION INSURANCE COVERAGE; AMENDING SECTIONS 39-8-202, 39-8-205, AND 39-8-207, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

~~NEW SECTION. Section 1. Department authority. The department is designated as a criminal justice agency within the meaning of 44-5-103 for obtaining criminal justice information to determine whether a controlling person is of good moral character.~~

Section 1. Section 39-8-202, MCA, is amended to read:

"39-8-202. Initial license application -- application fee -- standards -- provisional license. (1) An applicant for initial licensure as a professional employer organization or group shall file with the department a completed application on a form provided by the department.

(2) The application must be accompanied by a nonrefundable application fee and any material or information required by the department that demonstrates compliance with the requirements of this chapter. The application fee is:

- (a) \$750 for a resident or nonresident unrestricted license; and
- (b) \$500 for a restricted license.

(3) As a condition of licensure under this chapter, an applicant who is not a resident or who is domiciled outside the state must first be licensed as a professional employer organization or group in the state in which the

1 applicant is a resident or is domiciled if licensing is required by that state.

2 (4) An applicant for licensure as a professional employer organization or group must meet one of the  
3 following applicable standards:

4 (a) An individual must be 18 years of age or older.

5 (b) A partnership or a limited partnership shall provide the names and home addresses of all partners,  
6 indicate whether each partner is a general or a limited partner, and include a copy of the partnership agreement  
7 or an affidavit signed by all partners acknowledging that a written partnership agreement does not exist.

8 (c) A corporation shall state the names and home addresses of all officers, directors, and shareholders  
9 who own a 5% or greater interest in the corporation. A domestic or foreign corporation must have filed any  
10 required documents with the secretary of state and ~~must~~ shall remain in good standing ~~in order~~ to conduct  
11 business pursuant to this chapter.

12 (d) A limited liability company shall state the names and home addresses of those individuals who own  
13 a 5% or greater interest in the limited liability company. A domestic or foreign limited liability company must have  
14 filed any required documents with the secretary of state and ~~must~~ shall remain in good standing ~~in order~~ to  
15 conduct business pursuant to this chapter.

16 (e) A group:

17 (i) must be authorized to act on behalf of the group;

18 (ii) shall include for each professional employer organization within the group the information required  
19 in subsection (4); and

20 (iii) shall guarantee, on a form provided by the department and executed by each professional employer  
21 organization within the group, payment of all financial obligations with respect to wages, payroll-related taxes,  
22 insurance premiums, and employee benefits of each other member within the group.

23 (5) (a) An applicant shall also provide:

24 ~~(a)~~(i) the trade name or names under which the applicant conducts business, the business's taxpayer  
25 or employer identification number, the address of the business's principal place of business in the state, and the  
26 addresses of any other offices within the state through which the applicant intends to conduct business as a  
27 professional employer organization or group. If the applicant's principal place of business is located in another  
28 state, the address must be provided.

29 ~~(b)~~(ii) a list by jurisdiction of each name under which the applicant has operated in the preceding 5 years,  
30 including any alternative names, names of predecessors, and names of related business entities with common

1 majority ownership, and detailed information on the background of each controlling person to the extent required  
2 by the department; and

3 ~~(e)(iii)~~ other information requested by the department to show that the applicant and each controlling  
4 person are of good moral character, have business integrity, and are financially responsible. "Good moral  
5 character" means a personal history of honesty, trustworthiness, and fairness; a good reputation for fair dealings;  
6 and respect for the rights of others and for the laws of this state and nation.

7 ~~(b) (i) Each applicant and controlling person under subsection (5)(a)(iii) shall submit to a background  
8 investigation that includes a fingerprint check by the Montana department of justice and the federal bureau of  
9 investigation.~~

10 ~~(ii) The applicant is responsible for the cost of any fees associated with obtaining the fingerprint checks  
11 required by subsection (5)(b)(i). AS A PREREQUISITE TO THE ISSUANCE OF A LICENSE, THE DEPARTMENT SHALL REQUIRE  
12 THE APPLICANT TO SUBMIT FINGERPRINTS FOR THE PURPOSE OF FINGERPRINT CHECKS BY THE MONTANA DEPARTMENT  
13 OF JUSTICE AND THE FEDERAL BUREAU OF INVESTIGATION.~~

14 ~~(II) THE APPLICANT SHALL SIGN A RELEASE OF INFORMATION TO THE DEPARTMENT AND IS RESPONSIBLE TO THE  
15 DEPARTMENT OF JUSTICE FOR THE PAYMENT OF ALL FEES ASSOCIATED WITH THE CRIMINAL BACKGROUND CHECK.~~

16 ~~(III) UPON COMPLETION OF THE CRIMINAL BACKGROUND CHECK, THE DEPARTMENT OF JUSTICE SHALL FORWARD  
17 ALL CRIMINAL JUSTICE INFORMATION, AS DEFINED IN 44-5-103, CONCERNING THE APPLICANT THAT INVOLVES THE  
18 CONVICTION OF A CRIMINAL OFFENSE IN ANY JURISDICTION TO THE DEPARTMENT, AS AUTHORIZED IN 44-5-303.~~

19 ~~(IV) AT THE CONCLUSION OF ANY BACKGROUND CHECK REQUIRED BY THIS SECTION, THE DEPARTMENT MUST  
20 RECEIVE THE CRIMINAL BACKGROUND CHECK REPORT BUT MAY NOT RECEIVE THE FINGERPRINT CARD OF THE APPLICANT.  
21 UPON RECEIPT OF THE CRIMINAL BACKGROUND CHECK REPORT, THE DEPARTMENT OF JUSTICE SHALL PROMPTLY DESTROY  
22 THE FINGERPRINT CARD OF THE APPLICANT.~~

23 ~~(C) IF AN APPLICANT HAS A HISTORY OF CRIMINAL CONVICTIONS, THEN PURSUANT TO 37-1-203, THE APPLICANT  
24 HAS THE OPPORTUNITY TO DEMONSTRATE TO THE DEPARTMENT THAT THE APPLICANT IS SUFFICIENTLY REHABILITATED  
25 TO WARRANT THE PUBLIC TRUST, AND IF THE DEPARTMENT DETERMINES THAT THE APPLICANT IS NOT, THE LICENSE MAY  
26 BE DENIED.~~

27 (6) (a) Except for an applicant who is granted a restricted license under subsection (9), an applicant shall  
28 maintain a tangible accounting net worth of not less than \$50,000, evidenced by:

29 (i) providing financial statements that have been independently audited by a certified public accountant  
30 in accordance with generally accepted accounting principles; or

1 (ii) providing independently compiled financial statements and a \$100,000 security deposit in a form that  
2 is acceptable to the department.

3 (b) If, after licensure, an applicant defaults in paying wages or payroll-related taxes or in meeting any  
4 liability arising pursuant to Title 39, chapter 71, or this chapter, the security deposit may be used to meet those  
5 obligations. The security deposit may not be used in determining the net worth of an applicant.

6 (c) (i) Documents submitted to establish net worth must reflect net worth as of a date not more than 6  
7 months prior to the date on which the application is submitted.

8 (ii) Financial statements submitted must be attested by the president, chief financial officer, and at least  
9 one controlling person of the professional employer organization or group.

10 (iii) If an applicant is unable to meet the \$50,000 net worth requirement, the applicant shall provide to the  
11 department a surety bond, a letter of credit, or marketable securities acceptable to the department in an amount  
12 of not less than \$50,000 to cover the deficiency. If, after licensure, an applicant defaults in paying wages or  
13 payroll-related taxes or in meeting any liability arising pursuant to Title 39, chapter 71, or this chapter, the surety  
14 bond, letter of credit, or marketable securities provided to the department may be used to meet those obligations.

15 (7) The applicant shall maintain a positive working capital, as evidenced by financial statements.

16 (8) The department may provide by rule for the acceptance, in lieu of the requirements of subsections  
17 (6) and (7), of an affidavit provided by a bonded, independent, and qualified assurance organization that has been  
18 approved by the department certifying the qualifications of a professional employer organization or group seeking  
19 licensure under this chapter.

20 (9) The department may issue a restricted license for limited operation within this state to a professional  
21 employer organization or group that is a resident of or domiciled in another state if:

22 (a) the applicant's state of residence or domicile provides for licensing of professional employer  
23 organizations or groups; and the applicant is licensed and in good standing in that state and that state grants a  
24 similar privilege for restricted licensing to professional employer organizations or groups that are residents of or  
25 domiciled in this state and that are licensed under this chapter;

26 (b) the applicant does not maintain an office, a sales force, or a sales representative in this state and  
27 does not solicit clients who are residents of or domiciled in this state; and

28 (c) the applicant does not have more than 100 leased employees working in this state.

29 (10) An applicant for a ~~restricted~~ license shall appoint a recognized and approved entity as its registered  
30 agent to receive service of legal process issued against it in this state if a registered agent has not already been

1 appointed.

2 (11) The department may issue a provisional license to an applicant that allows the applicant to operate  
3 in this state while the applicant's application is being processed by the department. The department may not  
4 charge a fee for a provisional license. The department may adopt rules to implement the provisions of this  
5 subsection.

6 (12) A license issued under 39-8-204 or this section may not be transferred."  
7

8 **Section 2.** Section 39-8-205, MCA, is amended to read:

9 **"39-8-205. Renewal fees.** (1) The fee for the renewal of a resident or nonresident unrestricted license  
10 is \$750.

11 (2) The fee for the renewal of a restricted license is \$500.

12 (3) The application fee required in 39-8-202 does not apply to the renewal of an unrestricted license.

13 ~~(4) A restricted license may not be granted to a professional employer organization or group that is a~~  
14 ~~resident of or domiciled in another state if the state requires licensing but does not grant a similar privilege for~~  
15 ~~restricted licensing to a licensee who is a resident of or domiciled in this state.~~

16 ~~(5)~~(4) Fees collected must be used by the department to implement this chapter."  
17

18 **Section 3.** Section 39-8-207, MCA, is amended to read:

19 **"39-8-207. Requirements of licensee.** (1) A professional employer organization or group shall, by  
20 written contract with the client, establish the responsibilities and duties of each party. The contract must disclose  
21 to the client:

22 (a) the services provided, the administrative fee, and the respective rights and obligations of the parties;

23 (b) a statement providing that the professional employer organization or group:

24 (i) reserves a right of direction and control over employees assigned to the client's location. The client  
25 may retain sufficient direction and control over employees necessary to conduct business and without which the  
26 client would be unable to conduct business, discharge fiduciary responsibilities, or comply with state licensing  
27 laws.

28 (ii) assumes responsibility for the payment of wages of employees, workers' compensation premiums,  
29 payroll-related taxes, and employee benefits from its own accounts without regard to payments by the client; and

30 (iii) retains authority to hire, terminate, discipline, and reassign employees. The client has the right to

1 accept or cancel the assignment of an employee.

2 (c) a statement that, with respect to a worker supplied to a client by a professional employer organization  
3 or group, the client shares joint and several liability for any wages, workers' compensation premiums, and  
4 payroll-related taxes and for any benefits left unpaid by the professional employer organization or group and that,  
5 in the event that the licensee's license is suspended or revoked, this liability is retroactive to the client's entering  
6 into a contract with the licensee; and

7 (d) a statement that the client is responsible for compliance with the Montana Safety Culture Act, Title  
8 39, chapter 71, part 15.

9 (2) The professional employer organization or group shall:

10 (a) give written notice of the general nature of the relationship between the professional employer  
11 organization or group and the client to each employee assigned to perform services at the client's place of work.  
12 The disclosure must provide that the professional employer organization:

13 (i) reserves a right of direction and control over employees assigned to the client's location. The client  
14 may retain sufficient direction and control over employees necessary to conduct business and without which the  
15 client would be unable to conduct business, discharge fiduciary responsibilities, or comply with state licensing  
16 laws.

17 (ii) retains authority to hire, terminate, discipline, and reassign employees. The client has the right to  
18 accept or cancel the assignment of an employee.

19 (b) submit to the department, within 90 days of the end of each calendar quarter, information certified  
20 by an independent certified public accountant demonstrating that all payroll-related taxes for the quarter have  
21 been paid. Upon a showing of reasonable cause, one 30-day extension may be granted for each quarter. The  
22 department, by rule, may waive the requirements of this subsection (2)(b) if the licensee provides to the  
23 department an affidavit from an organization of the type specified in 39-8-202(8).

24 (c) maintain and make available for the department or its agent all records relating to the licensee's  
25 business conduct. Records must be maintained for 5 years after terminating ~~an employee leasing arrangement~~  
26 ~~or a~~ a professional employer arrangement or employee leasing arrangement.

27 (d) notify the department in writing within 20 days of a change of business address or a change in  
28 partners, directors, officers, members, or controlling persons designated in the license;

29 (e) notify the department in writing within 20 days after a client either commences or terminates a  
30 professional employer arrangement or an employee leasing arrangement with that professional employer

1 organization or group; and

2 (f) post the license issued in a conspicuous place in the principal place of business and display, in clear  
3 public view in each licensee's office, a notice stating that the professional employer organization or group is  
4 licensed and regulated by the department.

5 (3) (a) When a professional employer organization or group uses a professional employer arrangement  
6 with the client, both the professional employer organization or group and the client are the immediate employers  
7 of the workers subject to the arrangement for the purposes of the workers' compensation laws of this state.

8 (b) When a professional employer organization or group uses an employee leasing arrangement with the  
9 client, the professional employer organization or group is the immediate employer of the workers subject to the  
10 arrangement for the purposes of the workers' compensation laws of this state.

11 (4) A professional employer organization or group shall:

12 (a) pay wages and collect, report, and pay payroll-related taxes from its own accounts;

13 (b) pay unemployment taxes, pursuant to 39-51-1103, and provide, maintain, and secure all records and  
14 documents required of employers under the unemployment insurance laws of this state. For unemployment  
15 reporting purposes, each professional employer organization is the employing unit, as defined in 39-51-201, and  
16 shall keep separate records and submit quarterly wage lists for each of its clients.

17 (c) provide workers' compensation coverage for all employees and provide, maintain, and secure all  
18 records and documents required of employers under the workers' compensation laws of this state. A license may  
19 not be issued to a professional employer organization or group until the department receives proof of Montana  
20 workers' compensation coverage for all employees assigned to any client location in this state the professional  
21 employer organization or group.

22 (5) A professional employer organization or group is an employer for sponsoring and maintaining  
23 employee benefit and welfare plans. The plans, if limited to employees of the professional employer organization  
24 or group, are not multiple employer welfare arrangements. This section does not preclude the client from  
25 providing benefits to employees coemployed by a professional organization or group.

26 (6) A professional employer organization or group shall disclose to the department, to each client, and  
27 to its employees information on any health or life fringe benefit program provided for its employees. The  
28 information must include:

29 (a) the type of benefits;

30 (b) the identity of each insurer providing each type of coverage;

1 (c) the amount of benefits for each type of coverage and to whom or on whose behalf the benefits will  
2 be paid;

3 (d) the policy limits on each insurance policy; and

4 (e) whether coverage is fully insured, partially insured, or fully self-funded.

5 (7) Disclosure required by this section may be made by any written means reasonably calculated to  
6 adequately inform the employees, including a summary plan description that meets the requirements of the  
7 Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq., as amended.

8 (8) (a) Subject to any contrary provisions of the contract between the client and the professional  
9 employer organization or group, the professional employer arrangement that exists between the parties must be  
10 interpreted for purposes of insurance, bonding, and employer liability pursuant to subsection (8)(b).

11 (b) The professional employer organization or group:

12 (i) is entitled, along with the client, to the exclusivity of the remedy under both the workers' compensation  
13 and employers' liability provisions of a workers' compensation policy or plan of either party; and

14 (ii) is not liable for the acts, errors, or omissions of a client or of an employee acting under the direction  
15 and control of a client, subject to the provisions of this chapter. Subject to the provisions of this chapter, a client  
16 is not liable for the acts, errors, or omissions of a professional employer organization or group or of any employee  
17 of a professional employer organization or group acting under the direction and control of the professional  
18 employer organization or group.

19 (9) A professional employer organization or group that applies for workers' compensation coverage shall  
20 also maintain and furnish to the insurer sufficient information to permit the calculation of an experience  
21 modification factor for each client employer, including but not limited to:

22 (a) the client employer's corporate or business name;

23 (b) the client employer's taxpayer or employer identification number;

24 (c) the client employer's risk identification number;

25 (d) a listing of all employees assigned to each client employer and the applicable classification code and  
26 payroll; and

27 (e) the client employer's first report of injury identifying the client employer and any other information  
28 necessary to permit the calculation of an experience modification factor for each client employer.

29 (10) An employee assigned to a client by a professional employer organization or group is considered  
30 the employee of the client for purposes of general liability insurance, motor vehicle insurance, fidelity bonds,

1 surety bonds, and liquor liability insurance carried by the client. An employee assigned to a client by a  
2 professional employer organization or group is not an employee of the professional employer organization or  
3 group for purposes of general liability insurance, motor vehicle insurance, fidelity bonds, surety bonds, or liquor  
4 liability insurance carried by the professional employer organization or group unless the employee is included by  
5 reference in an employment arrangement contract, insurance contract, or bond.

6 (11) The sale of professional employer services pursuant to this chapter does not constitute the sale of  
7 insurance under Title 33 unless the professional employer organization or group:

8 (a) undertakes to indemnify another or pay or provide a specified or determinable amount of benefit  
9 based on determinable contingencies unless done through a licensed insurer or an employee welfare benefit plan  
10 as defined in 29 U.S.C. 1002(1);

11 (b) solicits, negotiates, effects, procures, delivers, renews, continues, or binds an insurance policy unless  
12 done through a licensed insurance producer; or

13 (c) is not exempt under 33-17-103(4).

14 (12) A sole proprietor or a working member of a partnership working under a professional employer  
15 arrangement may not receive unemployment insurance benefits unless the individual would otherwise be entitled  
16 to benefits if the professional employer arrangement did not exist.

17 (13) If the professional employer organization or group or the client complies with the provisions of  
18 39-71-401 with respect to a worker under the professional employer arrangement, the professional employer  
19 organization or group and the client, with respect to those workers, are not uninsured employers, as defined in  
20 39-71-501, and are not subject to the provisions of 39-71-508 or 39-71-515."

21  
22 ~~NEW SECTION. Section 4. Codification instruction. [Section 1] is intended to be codified as an~~  
23 ~~integral part of Title 39, chapter 8, and the provisions of Title 39, chapter 8, apply to [section 1].~~

24  
25 NEW SECTION. Section 4. Effective date. [This act] is effective July 1, 2007.

26 - END -